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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

ST. LOUIS-SAN FRANCISCO RAILROAD COMPANY and the ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
Petitioners,

vs.

E. B. SPILLER et al.,
Respondents.

No. 577.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF AMICUS CURIAE, CLIFFORD B. ALLEN,

Boatmen's Bank Building,
St. Louis, Missouri.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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MOTION OF CLIFFORD B. ALLEN FOR LEAVE TO FILE BRIEFS AS AMICUS CURIAE.

I. Now comes Clifford B. Allen and respectfully represents to the Court that he is one of the solicitors of Missouri shippers, from whom excess charges were exacted by the Missouri Pacific-Iron Mountain Railroads pending their Equitable Rate Contesting Cases instituted in the

Circuit Court of the Western District of Missouri in 1905 against the shippers and officers of the state. The shippers have intervened as overcharge claimants in the Missouri Pacific and Iron Mountain receiverships and the claims are still there pending. He is interested in the decision in this case.

II. That this Honorable Court has heretofore granted the privilege to the Missouri Pacific Railroad Company, which is a reorganization of the St. Louis, Iron Mountain & Southern Railroad and the Missouri Pacific Railway Company, to participate herein and file briefs as amicus curiae.

III. That the petitioners and respondents herein have consented to the undersigned filing a brief as amicus curiae therein, ~~as has also~~ and the Missouri Pacific Railroad Company, amicus curiae, as appears from letters and consent signed below.

Wherefore, the undersigned prays that an order be entered permitting him to file the brief hereto attached, as amicus curiae.

.....

NOTICE OF MOTION.

The petitioners and respondent in this case are hereby notified that the undersigned will, on the .... day of ....., 1927, on the convening of the Supreme Court of the United States on that date, or as soon thereafter as hearing may be had, submit for the hearing of said Court the foregoing motion.

.....

Service of the foregoing notice, motion and brief is hereby acknowledged, and we consent that the brief may be filed.

....., Attorneys for Respondent.

....., Attorneys for Petitioner.

....., Attorneys for Missouri Pacific.

SUBJECT INDEX.

List of Authorities Cited.

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I.

PREFACE.

We quote from page 2 of brief of amicus curiae, Missouri Pacific Railroad Company:

> "We are particularly concerned, because of the fact that over $1,000,000 of overcharge claims alleged to

> have been collected **UNDER THE PROTECTION OF AN INJUNCTION DECREE** during the Missouri rate litigation and predicated upon the so-called trust fund theory are still pending before the Special Master in the Missouri Pacific-Iron Mountain Receivership cases, and the attorneys for these claimants are attempting to construe the decision in the Circuit Court of Appeals in this case as an authority, to the effect that charges in excess of the statutory rates, although collected **UNDER AND PURSUANT TO A DECREE OF COURT OF COMPETENT JURISDICTION** are trust funds, and that they need only to be traced into the general cash account as distinguished from checking accounts in particular banks of deposit." (Black caps ours.)

These attorneys there referred to have asked the privilege of filing this brief, because it seemed only fair to the shippers of the State of Missouri and to this Court that their view upon this situation should be before the Court, as well as that of the Missouri Pacific Railroad Company.

In 1905 the Legislature of the State of Missouri passed what was known as the "Maximum Freight Rate Act." Eighteen railroads in Missouri applied to the federal court at Kansas City (in cases of St. Louis-San Francisco and seventeen other roads v. Hadley, Attorney-General, 155 Fed. 220, 161 Fed. 419, 168 Fed. 317) to restrain the institution of suits by shippers and state officials based upon the failure of the carriers to comply with said statutes, alleging that the application of said statutes to each of them would be unconstitutional, because (a) it would

result in confiscation, and (b) in discrimination against interstate commerce. A restraining order, followed by a temporary and then a permanent injunction, without either attempting to fix the rates to be charged by the carriers, was entered.

In 1907 that Legislature passed a second Maximum Freight Rate Act, and by supplemental bill the railroads secured temporary injunctions as against shippers and officers of the state from bringing suits based upon their failure to comply with said act.

In 1909 the District Court at Kansas City entered a final decree finding that (a) the application of the rates to the carriers would not result in discrimination, and (b) that it would result in confiscation, and enjoined the officers of the state and the shippers from instituting suits based upon their failure to comply with said acts until further order of the Court.

Thereupon cross appeals were taken to this Court. This Court, in June, 1913, decided all these cases, holding in the case of thirteen of the major roads that the application of the Maximum Freight Rate Acts of 1905 and 1907 would not result in either confiscation or discrimination, and that in the case of five minor roads it would result in confiscation, and reversed, in part, the decree of the court below and ordered the injunction dissolved and the carriers' bill dismissed. These cases appear as the Missouri Rate Cases in 230 U. S. 474. Minnesota, Oregon, West Virginia, Arkansas Rate Cases were decided at the same time, 230 U. S. 352, 513, 525, 555.

The shippers of Missouri, overcharge claimants in the Missouri Pacific-Iron Mountain Receivership cases, contentended, first, that the overcharges exacted by those carriers during their Equitable Rate Contesting Injunction were **not** collected under and pursuant to a decree of a court, for no decree or order fixed the rates to be charged, but were collected and retained in violation of a statute which stamped the collection and retention of such overcharges as unlawful, and which this Court held was constitutionally applied to them; and second, that such overcharges exacted in violation of a valid law, were entitled to a preferential payment, because there was always on hand in the treasury of the company cash, largely in excess of the aggregate sum of the excessive exactions, because from current income there had been diverted large sums of money to pay for additions and betterments to roadway and equipment, etc.; and third, because of the public duty that the carriers owed to the State of Missouri to return to the shippers these illegal exactions (Love v. North American, 229 Fed. 103; Mercantile Trust Co. v. Frisco, 69 Fed. 1931).

The fallacy of the Missouri Pacific argument is the contention (a) that the erroneously and subsequently dissolved injunction obtained by it restraining shippers from instituting suit against it for its failure to comply with a valid state statute (until the further orders of the Court) made the collection of such overcharges lawful, which a valid statute declared unlawful; (b) that the carrier, by

publishing an unjust and unreasonable rate, prohibited by statute, can make such rate a lawful one for it to collect; (c) that the withholding of excessive charges which, in equity and good conscience, belong to the shipper, does not result in a trust in invitum; (d) that is, the trust fund must be traced into a specific checking account of the trustee.

These contentions have been presented to and rejected by the courts in the cases infra.

II.

The Injunction Did Not Destroy Shippers' Cause of Action for Overcharges, Nor Make Them Lawful.

In the Arkansas Rate case, injunction bonds to a large amount had been required as a condition precedent to the injunction. After the reversal of that case and its remanding to the District Court to proceed in accordance with the opinion, a Master was appointed to hear claims for overcharges arising pending the injunction. Gallop, a shipper, instituted suit in the Chancery Court of Baxter County for an accounting and discovery of overcharges illegally exacted pending the injunction. The carrier applied to the Federal District Court in the Arkansas Rate case for an injunction restraining Gallop from so proceeding, and Judge Trieber issued the injunction (St. Louis I. M. and S. Railway Co. v. Bellamy, 211 Fed. 175). Gallop and the Public Service Commission of Ar-

kansas appealed from such decree to the United States Circuit Court of Appeals and that Court in (Bellamy v. Railway, 220 Fed. 878) decided:

> "Parties from whom excessive rates have been exacted were not confined to suing on the bond. They also had the right, given them by law, to recover the overcharges. **That right was not destroyed by the injunction, but was simply suspended. As soon as the injunction was out of the way, the right and remedy for its enforcement stood the same as if the injunction had never been issued.**"

The railroad appealed to this court, which affirmed the decision of the Court of Appeals in that case under title of Railroad v. McKnight, 244 U. S. 368, and said:

> "But Gallop makes no claim under the bond. He sues on **cause of action to recover overcharges arising under the Arkansas statute. His right to sue, suspended by the injunction, improvidently granted, revived as soon as the permanent injunction was dissolved by the decree dismissing the bill.** Although the injunction enjoined all shippers and travelers and, therefore, him, from instituting suits on account of alleged overcharges, Gallop **did not, in fact, become a party to the suit in the District Court; and he could not, after the mandate directed dismissal of the bill, be compelled to submit to that court the adjudication of his claim.**"

None of the Missouri shippers represented in this case was eo nomine parties to the Missouri Rate case.

In the Arkansas Rate case there was left to the shipper, who intervened therein, two remedies only. One for damages on the injunction bond for overcharges collected pending the temporary injunction, and the other by way of restitution for overcharges exacted pending the appeal.

This Court did not, in the Arkadelphia case, decide that the collection by the carrier of charges in excess of the Arkansas rate was a lawful or legal collection. On the contrary, it was held (249 U. S. 134) that

> "the damages were complete **when the overcharges were made**, and as they were **wrongfully made, and without the consent of the shipper**, interest ran from that date on general principles."

The Missouri Supreme Court, in **State v. C. & A.**, 265 Mo. 682, held that claims for excess freight and passenger rates were collected in violation of a valid law. In Judge Bond's dissenting opinion in that case (page 706) appears the following, which was consistent with the majority opinion:

> "What was the effect of the injunction in the federal court? Simply to prevent the enforcement against the defendant of the state statutes regulating its charges. It could not and did not go further. * * * Pending the final word of that great tribunal, the defendant in this case took the chance of violating the Missouri statute and compelled this plaintiff to pay $50,000 contrary to the terms of the Missouri statute. This was a violation of the law by defendant, who

did it with imputed knowledge that the ultimate decision of the constitutionality of the statute it was disobeying was the sole prerogative of the Supreme Court of the United States, and that in the event that court should sustain the statute a constitutional exercise of the lawmaking power of this state, every dollar which it had taken from the state while the question of its right to enact these laws was in issue, would be an illegal and wrongful appropriation of the property of the state."

In **Love v. North American Co.**, 229 Fed. 103, the Circuit Court of Appeals of the Eighth Circuit, said:

"The shippers not only paid the lawful charge, but they did more. They paid an excessive charge. That payment was an illegal exaction and as against the railroad company and volunteers like the Receiver, the money belonged to the shippers after the payment, the same as before. It will be presumed that it was a part of the money in the treasury of the company which passed to the Receiver. The money came into the hands of a court of equity. What ought such court have done with it? Surely it could do nothing but direct that it be returned to the shippers to whom it belonged. It having been paid to the bondholders, or for permanent betterments of the property for their benefit, through the agency of a court of equity, that court, as a court of conscience, can do no less than direct its restoration.

"Second. There is another aspect in which petitioners' equity appears equally strong. The railroad company got this money into its treasury by superseding rates that were fixed by authority of a state. When those rates were sustained, the carrier was bound to restore the excessive exactions. This was a duty not only to the shipper, it was a public duty owing to the state, whose orders had been superseded. It is a duty which this Court, and the Supreme Court, have always been scrupulously careful to safeguard. When superseding rates pending judicial inquiry as to their validity. It is a duty which a court of equity that has taken over the business of a public carrier by means of receivership, ought to be equally careful to enforce."

In the **Missouri Rate case** the railroads were not enjoined from putting in force the statutory rates. They themselves enjoined the institution of suits for the enforcement of those rates. They did not, however, secure from the Court the authority to collect, pending the injunction, the excessive rates on freight which they collected.

That the State had power to and did establish such rates is now put beyond question, by the decisions of this Court. That the statutory rates so established have been the **only lawful** rates from the time the statutes, by their terms, went into effect is also clearly established by the decisions of this Court and the Supreme Court of Missouri (cases supra). The fact that the carrier erroneously enjoined the shippers from instituting suit against it for

failure to comply with the statutes during its Rate Contest, **did not make the statutory rates unlawful, nor legalize the collection of the excess above the lawful rates**, nor destroy the shippers' right to recover the alleged overcharges in any action or forum which they had before the injunction was issued.

In **Newton v. Gas Co.**, 258 U. S. 165, this Court said:

> "Rate making is no function of the courts, and should not be attempted, either directly or indirectly."

In **N. Y. v. Gas Co.**, 269 Fed. 288, the Court said:

> "At the outset, however, it is desirable to make clear that this Court is not a rate-making body. The basic question is the constitutionality of the statute prescribing the rate."
>
> "It is elementary that courts cannot make rates. * * *" (Lighting Co. v. Nixon, 268 Fed. 149).

In entering the decree upon the mandate in the Missouri Rate case, in Railroad v. Barker, 210 Fed., l. c. 916, that Court said:

> "Commencing 24 years ago, in the case of Milwaukee R. R. Co. v. Minnesota, 134 U. S. 418, 33 L. Ed. 970, and continuing to the present time, there has been a uniform line of holdings that the fixing of a rate is a legislative act * * *."

The decree in the Missouri Rate case will demonstrate that no freight rates were fixed or authorized to be collected pending the injunction.

In addition, however, the dissolution of the injunction rendered enforceable another obligation assumed by the carrier when it procured the injunction, to do equity to the shipper by restoring the status quo, i. e., the right of the shipper to enforce restitution in the injunction suit. This was concurrent, consistent and cumulative to and with the rights of the shipper which existed before the injunction suit was brought, and which were restrained thereby. This right of restitution was the one enforced in the Arkadelphia case.

The Missouri Pacific Railroad Company in their argument overlooks entirely the fact that it was the prohibition of a valid statute, constitutionally applied to them, that stamped their collections and retention of overcharges, pending the injunction, as illegal. That the injunctions in the rate case simply enjoined the shippers from instituting suits based upon the carriers' failure to comply with a statute.

The railroads knew, as was said by the Supreme Court in **Thompson v. Kentucky**, 209 U. S. 346:

> **"That at any rate, it is the province of the courts to interpret the laws of the state, and he who acts under them must take his chances of being in accord**

with the final decision, and this is a hazard under every law and from which, or the consequences of which, we know of no security.''

An injunction of a nisi prius court is no security against the consequences of violating a state statute by it erroneously interpreted.

In **Vol. XII, Corpus Juris**, Title, Constitutional Law, p. 801, it is said:

> "If the decision that a statute is unconstitutional is subsequently reversed or overruled, the statute will be treated as valid and effective from the date of its enactment."
>
> Christopher v. Mungen, 61 Fla. 513, 534, 55 So. 273;
> Pierce v. Pierce, 46 Ind. 86;
> McCollum v. McConaughy, 141 Iowa 172, 119 N. W. 539.

In **White v. Delano, Receiver of the Wabash Railroad**, 270 Mo. 16, 34, 38, another one of the Missouri Rate Cases, the Supreme Court of Missouri said:

> "We, therefore, hold that the act under consideration was not suspended during the pendency of the injunction mentioned. * * *
>
> "The rate statutes here under consideration are valid, as held by the Supreme Court of the United States, and, therefore, the excessive charges collected from the plaintiff were **unlawfully collected**. * * *"

In the case of **Solumn v. Northern Pac. Ry. Co.**, 133 Minn. 93, 157 N. W. 996, the same contention came before the Minnesota Supreme Court, and in passing upon the question the Court said:

> "The injunction case went to the United States Supreme Court and that court held that the state statutes and the rates prescribed thereby were valid and dissolved the injunction. That the state had the power to and did establish such rates is now beyond question. As the state statute was a valid exercise of the legislative power, it necessarily follows that the rates prescribed therein **have been the lawful rates from the time that the statute declared they should go into effect.** * * * The fact that defendant was legally, but erroneously, restrained, for a time, from putting such rate into effect, **did not operate to make the rate unlawful or invalid during such period nor entitle the defendant to retain the excess above the lawful rate which it had collected by virtue of the erroneous injunction.**"

The overcharges were exacted in violation of a valid statute, and consequently must have been collected **without any legal right or authority to receive them.** The collection of an excessive rate is ipso facto unlawful under the Missouri statutes.

III.

The Collection and Withholding of Unlawful Freight Charges Results in Equity in a Trust In Invitum.

The Missouri Pacific Railroad contends that there is no difference in the rights and remedies of an intervener in

the original rate case and of a shipper who had not intervened in that case. An intervener in the original rate case, who sought to recover overcharges as damages after the final injunction, was exclusively confined to his remedy of restitution. But a shipper, who had not so intervened, had all the rights and remedies that existed (for the recovery of such overcharges) before and independent of the injunction (Fleming v. Reddick, 5 Grat. [Va.] 272; Little Rock v. Little Rock, 76 Ark. 48; Poultney v. Warren, 6 Ves. 73; Bellamy v. Rd., 220 Fed. 876; Rd. v. McKnight, 244 U. S. 369).

Such shipper had the right to go to any such forum and there predicate his recovery on the assumption that the collection and retention of such charges were entirely unlawful, and that he might do, whether his suit was for money had and received, or for the enforcement of a constructive trust, or for overcharges exacted in violation of the statute.

Judge Seddon, in the quotation appearing on page 10 of the brief of the Missouri Pacific Railroad, is in error in his conclusion, "it is not, as supposed by the learned counsel for the interveners, a case of a choice of two remedies for the same cause of action. The causes of action are distinctly antagonistic." The learned Special Master was led into this erroneous statement by his conclusion that the shippers were, eo nomine, parties to the Missouri Rate case, and they, therefore, lost their right to proceed to recover their overcharges in other forums

and in other causes of action. In that same report he said:

> "Of course, all which the Master has said with reference to the legality of the act of the defendant in collecting the freight charges and in reference to restitution, is predicated upon the assumption of two facts. First, that the intervener and other shippers were parties to the Missouri Rate case. Second, that the defendant was authorized by the decree of injunction in that case to collect freight charges. If they were not parties to that case, or if the act of the defendant in collecting the charges was not so authorized, the intervener has an unobstructed action for relief from an illegal act," etc.

That the Missouri shippers, represented by this attorney, were not parties, eo nomine, to the Missouri Rate case and that the injunctive orders in that case did not fix any freight rate to be collected pending that injunction cannot be successfully disputed.

On page 11 of the Railroad's brief there is a quotation from Judge Sanborn's opinion affirming the Special Master's said conclusion. The same infirmity appears therein. Judge Sanborn decided that the final decree was binding, "so far as the parties to the suit were concerned." But the interveners there contesting were not eo nomine parties to the Missouri Rate case and could not be compelled to be parties thereto after the Supreme Court reversed the Missouri Rate case and ordered the injunction dis-

solved. (See McKnight case, supra.) Nor was there any order, or decree, in the Missouri Rate case authorizing the carrier, pending that injunction, to collect any fixed rate of freight, whatsoever.

Judge Sanborn fell into another error in failing to appreciate that it was not the dissolution of the injunction which rendered the overcharges collected during its pendency wrongful and unlawful, but it was the state statute which stamped their receipt and retention as illegal, which statute had been held by this Court as constitutionally applied to those roads.

It may be that the facts upon which the carrier bases his argument upon restitution and reparation "entitle the plaintiff to a judgment at law or an action for money had and received, but it is also true that the defendants, having obtained possession of property belonging to another, may be treated as a trustee and a court of equity be invoked to coerce the execution of the trust" (People v. Houhtaling, 7 Calif. 348).

In **Philips v. Hines**, 33 Misc. 163, the Court said:

> "The adoption by the courts of law of a remedy especially belonging to chancery jurisdiction, certainly cannot take away the jurisdiction from a court of chancery."

It is respectfully submitted that the shippers have a cause of action for these overcharges, and the same facts may justify the accounting by the carrier for such over-

charges by way of restitution, reparation or restoration, or any other appropriate remedy to recover from another that which, in equity and good conscience, belongs to the plaintiff.

We respectfully contend that the decisions of the Special Master in the M. K. & T. Receivership and of Judge Sanborn are in conflict with the controlling decisions of the Court of Appeals and the Supreme Court hereinabove referred to (Bellamy v. Rd., 220 Fed. 878; Love v. North American, 229 Fed. 133-6-7; Rd. v. McKnight, 244 U. S. 368; Arkadelphia v. Rd., 249 U. S. 134). And with the decisions of the State of Missouri (Barker v. Rd., 265 Mo. 646; White v. Delano, 270 Mo. 634-8).

IV.

The Remedy of Reparation Is Based Upon the Theory That the Collection of Overcharges Was Unlawful.

Section 1 of the Act to Regulate Commerce provides that, "all charges * * * shall be reasonable and just and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful." It is, therefore, the duty of the carrier to publish only lawful rates. If the carrier sees fit to publish an unlawful rate he takes a chance of being in accord with the final decision of the Interstate Commerce Commission, and "that is a hazard under every law, and from which, and the consequences of which, we know of no security" (Thomp-

son v. Kentucky, supra). The carrier publishes such a rate at his peril and the fact that the shipper is compelled to pay such unlawful rate by the dominating position of the carrier over the shipper does not mitigate the carrier's offense; it aggravates it. The fact that by so posting the carrier may be compelled to continually collect the unlawful charges and be guilty of a series of trespasses upon the rights of the shipper is the chance that it takes.

The Interstate Commerce Commission in **Arkansas Fuel Co. v. R. R., 16 I. C. C. Reports,** p. 97, said:

> "While it may be, and indeed is, the legal rate, the rate that must be paid by the shipper and collected by the carrier, because it is the published rate, the mere publication cannot make a rate lawful that is unreasonable and excessive."

In the case of **Southern Pacific v. Darnell,** 245 U. S. 531, which was a reparation case, Justice Holmes, speaking for the Court (p. 534), said:

> "The plaintiff suffered losses to the amount of the verdict when he paid. **That claim accrued at once, in the theory of the law,** and it does not inquire into later events. * * * The carrier ought not to be allowed **to retain his illegal profit.** * * *"

In **Mills v. Lehigh,** 238 U. S. 473, a reparation case, Justice Hughes (p. 481) said:

"What the Commission decided was that the shippers were entitled to reparation. That is, to be made whole. **To be compensated for losses because of an illegal and unreasonable exaction.**"

In **Philips v. Grand Trunk**, 236 U. S. 662, Justice Lamar said:

"When the overcharge was collected, a **cause of action at once arose, and the shipper at once had the right to file a complaint, or to intervene in proceedings instituted by others.**"

The Circuit Court of Appeals, in **Darnell v. Southern Pacific**, 221 Fed., l. c. 894, said:

"On the other hand, **the charging of an excessive and unreasonable rate is ipso facto unlawful.**"

In **L. & N. R. R. Co. v. Schloss-Sheffield Steel & Iron Co.**, 269 U. S. 222, 70 L. Ed. 245, in a reparation case under the Interstate Commerce Act, this Court, through Judge Brandeis, said:

"The wrong for which the statute renders the carrier liable is the exaction of payment pursuant to an unlawful rate, not the withholding of the excess unlawfully exacted. * * * On the findings made we cannot say that the conclusion of the Commission that interest should be paid from the date of the illegal exaction was unwarranted."

In **Baer Bros. Mercantile Co. v. Denver & R. G. R. Co.**, 233 U. S. 477, 58 L. Ed. 1055, this Court, speaking through Justice Lamar, said:

> "This situation was dealt with by the Hepburn Act which, in addition to existing powers to make reparation, conferred upon the Commission the new power to make rates for the future. But the two matters were treated as different subjects and were dealt with in separate sections. Section 4 conferred the power of making rates. Section 5 gave the Commission power to make reparation orders. * * * Not only were the two functions separately treated, but an analysis of the act shows that there is no such necessary connection between them as to make the quasi-judicial order for reparation depend for its validity upon being joined with the quasi-legislative order fixing rates. Persons entitled to one may have no interest in the other. Persons interested in both may be entitled to reparation and not to the new rate or to the new rate and not reparation. * * *"

The order for reparation in the Spiller case was absolutely valid. The case cited by the railroads, C. B. & Q. R. R. Co. v. Merriam and Millard, 297 Fed. 1-3, has no application to the facts in the instant case because the claim was not on an order of the Commission.

The very theory of the reparation provisions of the Interstate Commerce Commission Act is that the overcharges were unlawfully collected, and a cause of action accrued at the time of their collection and the award of reparation is simply the ascertainment by the Commission of the

amount of such unlawful exactions and the provision in the act that such award may be enforced by proceedings in the federal court elsewhere, or judgment thereon, bears, on its face, the stamp that such amount had been unlawfully exacted, and in case such judgment must be filed in a receivership reorganization proceeding, it should there be treated as a conclusive adjudication that the overcharges there evidenced were unlawfully exacted, and there that judgment would be entitled to a preferential payment.

The amicus curiae, the Missouri Pacific Railroad Company, attempts to make a distinction between "restitution," "reparation" and what it sees fit to call "the trust fund theory." In Bouvier's Law Dictionary, "reparation" is defined to be "the redress of an injury, amends for a tort inflicted." The same authority defines "restitution" as "the return of something to the owner of it, or to the person entitled to it."

Both these remedies are enforced in the proceeding in which the judgment or decree is entered. In neither proceeding, in the case of a rate statute, does the reversal of the decree or the award of the Commission make unlawful the rates actually collected, but in each case, the valid statute, state or federal, makes their collection ipso facto unlawful.

It seems to be conceded by the Missouri Pacific Railroad Company that restitution and reparation are both based upon the theory that the shipper is truly and

equitably entitled to the overcharge, and the carrier cannot conscientiously withhold such excess charges from the person who is entitled to it. But, in addition to that, in such cases, a violation of the state statutes is a further fact that such statutes stamp the receipt and retention of such excessive charges as illegal.

Justice Story (Sec. 1255, 2 Story Equity Jurisprudence, 13th Ed. 604) says:

> "One of the common cases in which a court of equity acts upon the grounds of implied trust in invitum is where a party has received money which he cannot conscientiously withhold from another party. **It has been well remarked that the receiver of money which consistently with conscience cannot be retained is in equity sufficient to raise a trust in favor of the party for whom or on whose account it was received. This is the governing principle in all such cases. And therefore, whenever any interest arises, the true question is, not whether money has been received by a party of which he could not have compelled the payment, but whether he can now, with a safe conscience, ex aequo et bono, retain it.**"

In 39 Cyc 179 the rule is stated in the following language:

> "One who acquires land or other property by fraud, misrepresentation, imposition, concealment, **or under any other such circumstances as rendered it inequitable for him to retain it,** is in equity regarded

as the trustee of the party who suffers by reason of the fraud or other wrong, and who is equitably entitled to the property."

That the carrier is not in equity and good conscience entitled to retain the overcharges is the crux of his argument upon restitution and reparation and he demonstrates that in equity a trust in invitum may be therefore decreed.

In **Newton v. Porter**, 69 N. Y. 133, the Court said:

"The law in such a case will raise a trust in invitum out of the transaction, for the very purpose of subjecting the substituted property to the purpose of indemnity and recompense. 'One of the most common cases,' remarked Judge Story, 'in which a court of equity acts upon the ground of an implied trust in invitum, is when a party receives money which he cannot **conscientiously withhold** from another party.' "

In **Angle v. C. S. P. M. Co.**, 151 U. S. 1, this Court said:

"If one party obtains the legal title * * * in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it and who is considered in equity as the beneficial owner. * * *"

V.

TRACING TRUST FUNDS.

Whether either the exaction of the overcharge or the retention from the shipper, or both, were unlawful, the result in equity would be a trust in invitum. The inequitable act created the trust. It is the existence of a trust, and not the manner of its creation which gives rise to the presumption of identity, and the rule of confusion does not prevent such following of chattels and money of chattels and money (Southern Oil Co. v. Elliot, 218 Fed. 569; Erie Rubber Co. v. Dial, 140 Fed. 169; Smith v. Tp. of Au Gres, Mich., 150 Fed. 257; Gorman v. Littlefield, 229 U. S. 19; Duel v. Holland, 241 U. S. 523.

The stock and bondholders of the Frisco Railroad, operating that **"railroad unit,"** desired to reorganize that company in accordance with a plan of reorganization agreed to by them, without any participation on the part of the unsecured creditors. In accordance with said plan, the stock and bondholders of the old company instituted the equitable reorganization receivership. The very purpose of such plan of reorganization was to prevent a sale of said railroad unit (and a distribution of its proceeds among its creditors) and to preserve that "railroad unit" for the stock and bondholders of the old company (Tr. p. 312, et seq.).

If the "railroad unit" with and into which these overcharges were commingled and converted was to be re-

tained for the stockholders and bondholders of the old company, through their reorganization, there would be no necessity for tracing the overcharges into any specific bank account or chattel, because no specific piece of property was going to be sold, and no distribution of the proceeds of any such property or bank account was to be distributed in this equitable reorganization receivership to the creditors and claimants of the old company. The unsecured creditors were to be paid by stock of the reorganized company and there was no occasion to marshall assets. This entire railroad unit, with bank account, franchises, etc., was to be preserved for the benefit of the mortgagor and mortgagee, the stockholders and bondholders of the old company.

In **Guaranty Trust Co. v. Mo. Pac. Ry. Co.**, 238 Fed. 815, Judge Hook, administrative Judge in the Missouri Pacific Receivership, said:

> "After all that can be said from the standpoint of theory and strict right, the fact remains that many railroad receiverships, and the one here is typical of them, are but instruments for consummating plans of reorganization, and courts have come to realize that such use of their jurisdiction and processes entail a correlative duty to those affected by the result. Generally, in such cases, the principal parties to the suit are adversary only in name, and the existence of a collateral agreement, or understanding, sought to be consummated is suggested by the face of the pleadings. The relation between the receivership which

ensues and the plan of reorganization agreed upon is close and intimate. So far as properly can be done. the judicial proceedings are conducted in harmony with the plan, and the success of the agreed readjustment is promoted by the orders of the Court and the acts of the Receivers."

The correlative duty which is recognized as due from the Court to the shippers and the creditors affected by such reorganization is further illuminated by the following decisions of this Court: Chicago Ry. Co. v. Howard, 7 74 U. S. 409, Louisville Trust Co. v. Rd., 174 U. S. 674; Northern Pacific v. Boyd, 228 U. S. 482; Kansas City & Southern Ry. Co. v. Guardian Trust Co., 240 U. S. 166.

In **Louisville Trust Co. v. L. N. A. & C. Ry. Co.**, 174 U. S. 674, this Court said:

> "Can it be that when in a court of law the right of an unsecured creditor is judicially determined and that judicial determination carries with it a right superior to that of the mortgagor, the mortgagor and the mortgagee can enter into an agreement by which, through the form of equitable proceeding, all the right of these unsecured creditors may be wiped out, and the interest of both mortgagor and mortgagee in the property preserved and continued? The question carries its own answer. Nothing of the kind can be tolerated. * * * It involves an offer, a temptation to the mortgagor, the purchase price thereof to be paid, not by the mortgagee, but, in fact, by the unsecured creditor."

The equitable reorganization receivership was a mere form of proceedings conducted in accordance with the plan of reorganization. There was to be no actual sale thereunder, but the railroad unit was to be transferred to the reorganized stock and bondholders of the old company. The prearranged sale took place in the City of St. Louis on July 19, 1916 (Tr., p. 638).

Elmer and Phillips, the purchasing committee of the reorganization, bid in the property and duly assigned that bid to the St. Louis-San Francisco Railway Company, a corporation organized to operate same (Tr., pp. 640-47). Property embraced in collateral trust agreement of July 1, 1911, was sold as an entirety for $10.00; property embraced in trust agreement of September 3, 1912, was sold as an entirety for $10.00; securities pledged to secure the promissory note of the railroad company held by the North American Company, was sold as an entirety for $600,000.00; all the remaining property of every kind and description of the railroad company was sold as an entirety for $45,700,000.00, to be paid for in bonds of the old company, to be credited or canceled. Master's report to this effect was duly filed July 19, 1916 (Tr., pp. 640-647), and $45,600,000.00 of stock of the new company was issued to stockholders of the old company without compensation, as held by the Court of Appeals in this case and the Master (Tr., p. 147).

Just how the bondholders of the old company can be said to be innocent purchasers of a railroad unit, with-

out notice and knowledge of their agreement in the plan of reorganization with the stockholders, and just how they can be said to be purchasers for value, when this Court has said above it would not be the bondholders in a sale of that kind, but the unsecured creditors who paid the consideration, is incomprehensible (Mo. Pac. Argument, p. 19).

This railroad unit into which the overcharges went, and into additions and betterments thereto, and the payment of taxes thereon and interest on the bond secured thereby, after this form of equitable proceeding, is still owned by the stock and bondholders of the original and reorganized company, and is still burdened with the same equities to account therefor to the shippers, from whom overcharges were exacted, just the same as before the receivership.

The Receiver, the purchasers at the so-called sale and the reorganized company are mere volunteers, and the creditors who have liquidated their claims by accepting stock in the new company can in nowise be prejudiced by the payment under the Spiller decree as the Court of Appeals held.

The brief of the Missouri Pacific Railroad Company concludes with a strong and, we submit, a wholly unjustifiable condemnation of Judge Kenyon's opinion. This opinion speaks for itself, and we venture to assert it will go down in the history of jurisprudence as one of the great opinions in cases involving the rights of shippers against

carriers which have extorted an unjust and unreasonable rate.

It is respectfully submitted that the decree of the Court of Appeals in this case should be affirmed.

CLIFFORD B. ALLEN,
Amicus Curiae.

OPINION

SUPREME COURT OF THE UNITED STATES.

No. 577.—October Term, 1926.

St. Louis and San Francisco Railroad Company et al., Petitioners, *vs.* E. B. Spiller et al.	On Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[May 16, 1927.]

Mr. Justice Brandeis delivered the opinion of the Court.

In 1913, the federal court for eastern Missouri appointed receivers for the St. Louis and San Francisco Railroad. In 1916, the system was sold on foreclosure, was purchased for the Reorganization Committee and was conveyed to the St. Louis-San Francisco Railway Company which has operated it since. In 1920, Spiller recovered in the federal court for western Missouri a judgment against the old company *in personam* for $30,212.31 and for counsel fees taxed as costs pursuant to § 16 of the Act to Regulate Commerce.[1] Thereupon, he filed in the receivership suit,[2] upon leave granted, an intervening petition praying that the judgment be satisfied out of the property so acquired by the new company. The Master recommended that the prayers of the petition be granted. The District Court denied Spiller any relief and dismissed the intervening petition without costs to either party. 288 Fed. 612. The Court of Appeals reversed the decree; remanded the case to the lower court with directions to enter a decree for Spiller in the amount of the judgment with interest but without counsel fees; declared that the judgment was prior in lien and superior in equity to the mortgages of the old company; and directed that it be enforced against the property conveyed to the new

[1]The intervening petition and the decree cover also another judgment for $3,652.97 in favor of Spiller and others.

[2]There were in fact four suits; two brought by unsecured creditors and two by the trustees of mortgages under which the foreclosure was had. All the suits were consolidated in May, 1914.

company. 14 F. (2d) 284. This Court granted the petition of the two companies for a writ of certiorari. 272 U. S. —.

The judgment which Spiller seeks to enforce through the intervening petition was entered by the trial court in 1916, after the foreclosure sale and before confirmation thereof; was reversed by the Court of Appeals in 1918; and was reinstated by this Court in 1920. *Spiller* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 253 U. S. 117. It is for overcharges collected by the old company, in 1906, 1907 and 1908 under a freight tariff which had been increased in 1903 and which was held by the Interstate Commerce Commission to be unreasonable in 1905, and again in 1908. *Cattle Raisers' Association* v. *Missouri, Kansas & Texas R. R. Co. et al.*, 11 I. C. C. 296; 13 I. C. C. 418. The action in which the judgment was recovered was begun in 1914, after the appointment of the receivers. The reparation order on which the action was based was entered also after their appointment; but the petition for reparation was filed prior thereto.

The validity of the judgment as against the old company is not challenged in this proceeding. The question here is whether Spiller is entitled to have it satisfied out of the property of the new company. The railroads contend that in nature the claim is one not entitled to preferential payment; and that, in any event, Spiller is barred by laches or otherwise from obtaining any relief in this suit. The Court of Appeals held that the old company became liable as trustee *ex maleficio* for overcharges and that this liability is enforceable, as upon a constructive trust, against the property acquired by the new company on foreclosure. It held further that Spiller was not barred by laches or otherwise, because of the provision of the foreclosure decree, by which the purchaser became bound to pay, as a part of the purchase price, any unpaid claims of creditors of the old company which should be adjudged superior in equity to its mortgages, the court reserving to itself jurisdiction to determine the amount and validity of any such claim.

First. The contention that the judgment constitutes a lien or equity upon the property of the new company, as upon a constructive trust, rests upon the following argument. The freight rates being unreasonable were unlawful. The shipper was obliged to pay the charges exacted, although they were unlawful, because they were the published rates. As the shipper was obliged to pay the un-

lawful charges the payment was made under duress. One may be held as trustee *ex maleficio* of funds obtained by duress as well as of those procured by fraud. The old company by collecting the unlawful charges became trustee *ex maleficio* of the funds collected. These can be traced and may be followed. They passed to the receivers who took the funds with notice and without paying value. Upon the foreclosure they passed to the new company. It also took them with notice and is subject to the trust, either because the shipper's equitable lien or interest was not cut off by the foreclosure sale, to one with notice, in a suit to which the shipper was not a party, or because the new company agreed to pay pursuant to the foreclosure decree claims prior in lien and superior in equity to the mortgages of the old company.

We need not consider whether, in the absence of legislation, charges illegally exacted by a carrier may be recovered under the doctrine of a constructive trust; or whether the alleged equitable remedy is applicable to overcharges subject to the Interstate Commerce Act, which provides a different remedy;[3] or whether the equitable remedy, if any, has been lost by proceeding to judgment at law. For, even if the overcharges when collected, were subject to a constructive trust in favor of the shipper, the contention that the money exacted by the old company in 1906, 1907 and 1908 can be traced into the hands of the receivers is unfounded. The money was not ear-marked. It was mingled when collected with other money received from operation. And no special account was kept of it. The latest exaction occurred five years before the appointment of the receivers. The assertion that the money collected can be traced into the receiver's hands is confessedly without any support except the stipulated fact that, throughout the ten years which elapsed between the earliest exaction and the transfer of the properties to the new company, the old one and the receivers had, at all times, in the several banks on which checks for current expenses were drawn, a working balance, in the aggregate, largely in excess of Spiller's claim. Such a showing fails to bring the present case within the rule by which, when trust funds are mingled

[3]See §§ 8, 16(1), and 16(2) of the Interstate Commerce Act as it stood at the time of the overcharges in question, Act of Feb. 4, 1887, c. 104, 24 Stat. 379, 382, 384, as amended by the Act of June 29, 1906, c. 3591, 34 Stat. 584, 590. See also Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426.

with others, the *cestui* may assert an equitable lien upon the mingled mass to the extent of his contribution thereto.[4] *American Can Co.* v. *Williams*, 178 Fed. 420, 423; *In re A. D. Matthews' Sons*, 238 Fed. 785, 787. An illegal exaction does not impress an indelible trust upon all funds which the wrongdoer and his successors may thereafter have on deposit in their banks. For aught that appears, all the money illegally exacted may have been spent for current operating expenses.

Second. Spiller contends that he was entitled to preferential payment of his judgment for the excess charges, out of operating income accruing during the receivership, on the doctrine of *Fosdick* v. *Schall*, 99 U. S. 235, 251-255. See *New York Dock Co.* v. *S. S. "Poznan"*, No. 229, decided April 11, 1927, pp. 3-4. It is argued that the test of this equity is the nature of the claim; that a liability for excess charges unlawfully exacted by the carrier before the receivership is an expense of operation like a debt incurred for labor, supplies, equipment or improvements; and that, as such, it is entitled to priority over bondholders. We need not determine whether the noncontractual claim here in suit is in its nature within the class of debts entitled to preferential payment under the doctrine of *Fosdick* v. *Schall*. For, by long established practice, the doctrine has been applied only to unpaid expenses incurred within six months prior to the appointment of the receivers. See *Lackawanna Coal Co.* v. *Trust Co.*, 176 U. S. 298, 316. Compare *Gregg* v. *Metropolitan Trust Co.*, 197 U. S. 183. The cases in which this time limit was not observed, are few in number and exceptional in character. See *Burnham* v. *Bowen*, 111 U. S. 776, 780-783; *Union Trust Co.* v. *Morrison*, 125 U. S. 591. In no case which has come to our attention has the doctrine been applied to liabilities which, like those here in question, accrued many years before the receivership began.

Third. Preferential payment is urged also on the ground of public policy. The argument is that the carrier is invested through its franchise with a part of the sovereign power; that in the exercise of the power conferred the old company exacted illegal rates

[4]Compare National Bank v. Insurance Co., 104 U. S. 54, 63-68; Schuyler v. Littlefield, 232 U. S. 707, 710; United States v. Leary, 245 U. S. 1, 5; Cunningham v. Brown, 265 U. S. 1, 11-13; Southern Cotton Oil Co. v. Elliote, 218 Fed. 567, 570-571; In re A. Bolognesi & Co., 254 Fed. 770; Knatchbull v. Hallett, 13 Ch. Div. 696.

which the shipper was obliged by law to pay; that when the old company's property passed into the hands of the court it was augmented by the illegal exactions; that it became the court's duty to make restitution; and that, having failed to do so while the property was in its hands, the court may require payment from the new company. It may be assumed that this claim for overcharges is meritorious in character; but the fact that it arose many years before the appointment of the receivers is conclusive against including it among those entitled to preferential payment.

Fourth. In order to establish as against the new company either the alleged equity or a right to preferential payment, it was moreover assumed to be necessary that the claim should be one of those which the purchaser, under the decree of foreclosure, agreed to pay, as part of the purchase price. The decree provided that the purchaser would not be required to pay any "claim or demand which has not been presented in this cause in accordance with the orders, heretofore made requiring presentation thereof" unless it be "a claim or demand which may arise after the entry of this decree." An interlocutory decree had ordered that all claims be presented before February 1, 1916 or be barred of enforcement against the property in the hands of the receivers or the proceeds thereof. Due notice of the order had been given by publication. Spiller did not file his claim within the time limited. He contends that the time limit has no application to his claim, because it arose after entry of the decree.

The argument is that while the claim accrued in 1914, when the reparation order was entered, or earlier when the overcharges were illegally collected, it did not "arise" until 1920 when this Court, reversing the Court of Appeals, reinstated the judgment sought to be enforced by the intervening petition; that, in this connection, the term "arise" must have been used by the District Court in a sense different from "accrues". For, knowing through its receivers, that their counsel were, at the time of the entry of the decree of foreclosure, hotly contesting Spiller's claim, and that he was asserting that it was superior in equity to the mortgages to be foreclosed, and knowing also that the claim had not been filed in the receivership suit, the court must have intended that if Spiller ultimately prevailed, his claim should be satisfied by the new company. Unless so construed, the provision for claims which may "arise" after the decree would be practically inoperative. The

argument is not persuasive. We are of opinion that the term "arise" was used in the decree as the equivalent of "accrue"; that Spiller's claim arose at least as early as 1914, when the reparation order was entered, not when the judgment was recovered; and that the new company did not assume to pay it. See *Phillips* v. *Grand Trunk Ry. Co.*, 236 U. S. 662, 666. Moreover, while the barring clause of the final decree excepted claims arising after entry thereof, the clause stating the liability of the purchaser included only claims against the old company which should be adjudged prior in equity to the old company's mortgages. We have already decided that the claims in question are not of such a character.

Fifth. Spiller contends also that he is entitled, under the doctrine of *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 482, to require the new company to satisfy in full his judgment against the old. The argument is that, under the reorganization plan, stockholders of the old company were allowed to participate in the new, but that he, a creditor, was not offered an opportunity to do so. There is no evidence in the record which supports the assertion that Spiller was not afforded an opportunity of participating in the reorganization. The contrary appears. The order confirming the foreclosure recites that "a fair and timely offer of cash . . or participation" was made to those unsecured creditors who had filed claims. Spiller did not file his claim. The fact that he did not have actual knowledge of the order limiting the time for filing claims is not material in this connection. Notice by publication was legally sufficient. The mere fact that his claim was contested did not exclude him from the scope of the order. He might have filed it although he was litigating elsewhere. He cannot bring himself within the doctrine of the *Boyd* case by showing that no offer was made to him personally. For aught that appears an offer would have been made, or his rights otherwise preserved, if he had filed his claim. There is no occasion to consider whether a petition for intervention filed in the receivership proceedings four years after confirmation of the foreclosure sale is an appropriate method of enforcing the claim on this theory.

Sixth. While the Court of Appeals erred in granting the specific relief prayed in the petition for intervention, it does not follow that Spiller must be denied all remedy. He was guilty of a serious inadvertence in not filing his claim in the receivership suit within the time limited by the interlocutory order. But it is clear that

he has not been guilty of laches. *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483, 488-490. And it does not appear that his inadvertence misled in any way the court, the receivers, the Reorganization Committee or the new company. He had prosecuted his claim with vigor for years before the receivers were appointed. His diligence does not appear to have slackened either during the receivership or after the foreclosure sale. Throughout the whole period, the claim appears to have been resisted with equal vigor. After the old company ceased to function, counsel for the receivers conducted the defense. After the receivers ceased to function, counsel for the new company conducted the defense. It is clear that neither the receivers nor the new company considered the failure to file the claim in the receivership a bar to the relief.

Before Spiller recovered judgment in the trial court, the sale on foreclosure was had; but the hearing on the order to confirm the sale was yet to be held. At that hearing Spiller gave, before the confirmation of the sale, notice in open court, and otherwise to the old company, to the receivers, to the Reorganization Committee and to the new company, that he had recovered judgment fourteen days before. He notified them that he claimed that the purchaser would take the property subject to all his rights; and that these included a charge upon the property in the hands of the purchaser for full payment of the judgment. With knowledge of Spiller's claims, the Reorganization Committee and the new company took over the property. Later, the new company assumed the further defense to the action in which the judgment had been recovered. The issue of the securities of the new company and the distribution of its stock among stockholders in the old occurred after these notices of Spiller's claim had been given. Under such circumstances, neither the long delay, nor the failure to file claims as required by the interlocutory and final decrees, should operate to prevent the appropriate relief;[5] and the District Court had jurisdiction to grant it. Compare *Julian* v. *Central Trust Co.*, 193 U. S. 93; *Wabash Railroad* v. *Adelbert College*, 208 U. S. 38, 54-57.

The new company contends, that since the shipper's claim was not filed within the time limited by the interlocutory decree it was

[5]See Williams v. Gibbes, 17 How. 239, 254-257; Park v. New York, L. E. & W. R. R. Co., 140 Fed. 799; Employers' Assur. Corp. v. Mahogany Co., 6 F. (2d) 945. Compare Farmers' Trust Co. v. Chicago, etc. R. R. Co., 118 Fed. 204; Western N. Y., etc. Ry. Co. v. Penn Refining Co., 137 Fed. 343.

among those declared barred by the terms of the final decree; and that by intervening he estopped himself from obtaining any relief.[e] No good reason is shown why relief may not be had as well upon an intervening petition as upon an original bill. As this may be done, he should be put, as nearly as may be consistently with the rights of others, into the position which he would have occupied had he filed his claim in the receivership proceedings in the proper time. It does not appear that it is not possible for the new company to give him the benefit now of the offer which was made by the Reorganization Committee to the other unsecured creditors of the old company; nor that such a course would be inequitable to others in interest. The ascertainment of the relevant facts and the precise form of the relief must be left to the District Court. The decree of the Circuit Court of Appeals is affirmed in so far as it reversed the decree of the District Court dismissing the intervening petition; and is reversed in so far as it directed that the judgment is a prior lien enforceable for the full amount exclusive of counsel fees against the property of the new company.

Decree affirmed in part, and reversed in part.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[e]Compare Swift v. Black Panther Gas Co., 244 Fed. 20; Commercial Electrical Supply Co. v. Curtis, 288 Fed. 657.